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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 439

MILWAUKEE TOWNE CORPORATION, A CORPORATION,
Petitioner,

vs.

LOEW'S INCORPORATED, A CORPORATION; PARAMOUNT PICTURES, INC., A CORPORATION; RKO RADIO PICTURES, INC., A CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION, A CORPORATION; WARNER BROS. PICTURES DISTRIBUTING CORPORATION, A CORPORATION; WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, A CORPORATION; WARNER BROS. THEATRES, INC., A CORPORATION; AND COLUMBIA PICTURES CORPORATION, A CORPORATION,

Respondents.

REPLY TO RESPONDENTS' ANSWER TO PETITION FOR CERTIORARI.

THOMAS C. MCCONNELL,
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THE GUNTHORP-WARREN PRINTING COMPANY, 1

INDEX.

PAGE

I. The decision of the Court of Appeals that a demand the acceptance of which is precluded by conspiracy is a condition precedent to bringing a civil anti-trust suit raises a question of paramount public importance in the administration of the anti-trust laws 1-8

II. It was not within the authority of the Court below to set aside the findings of the trial court that petitioner had demanded first run pictures in 1946, and the decision of the Court below is in conflict with that of this Court in the case of United States *vs.* Yellow Cab Company 8-10

Conclusion 10

CITATIONS.

CASES.

Bigelow, et al. vs. RKO Radio Pictures, Inc., et al., 327 U. S. 251 7

William Goldman Theatres, Inc., vs. Loew's, Inc., et al., 150 F. 2d 738, 744 3

Milgram, et al. vs. Loew's, Inc., et al., CCH Tr. Reg. Rep., Par. 62,938 (C. A. 3, 1951) 9-10

Ulrich, et al. vs. Ethyl Gasoline Corporation, 2 Federal Rules Decisions, 357, 359 6

United States vs. Yellow Cab Company, 338 U. S. 338, 342, 341 ..... 9, 10

STATUTES AND MISCELLANEOUS.

Section 52(a) Federal Rules of Civil Procedure 8, 10

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Respondents.

REPLY TO RESPONDENTS' ANSWER TO PETITION FOR CERTIORARI.

I.

THE DECISION OF THE COURT OF APPEALS THAT A DEMAND THE ACCEPTANCE OF WHICH IS PRECLUDED BY CONSPIRACY IS A CONDITION PRECEDENT TO BRINGING A CIVIL ANTI-TRUST SUIT RAISES A QUESTION OF PARAMOUNT PUBLIC IMPORTANCE IN THE ADMINISTRATION OF THE ANTI-TRUST LAWS.

While respondents make a strenuous effort to persuade this Court (pages 3-11 of the answer) that the Court of Appeals did not set aside the award of damages for the

"first damage period" upon the ground that "plaintiff made no demand during that period for pictures to exhibit on first run", the opinion itself conclusively demonstrates the contrary. The Court of Appeals said (R. 3761) "We are of the view that it cannot be held that defendants' conspiracy was the direct and proximate cause of plaintiff's damage because it was prevented from negotiating and obtaining first run pictures *in the absence of a demand or request*". (Italics ours.) It hardly lies in the mouths of respondents to assign some other view to the Court and the fact that they attempt it is a tacit admission, that the Court's view cannot be sustained.

This ruling reversed the finding of the trial court (Finding 56, R. 3343) holding:

> "56. Plaintiff has been damaged by the uniform zoning and clearance schedule adopted and used by defendants by virtue of the classification of the Miller Theatre as a second run theatre and by clearances created under said schedule and imposed and carried out by agreement between defendants during the period from May 2, 1946 to August 15, 1946, *preventing plaintiff from obtaining pictures free from such restraint;* that the delay in obtaining pictures caused by such illegal classification or clearance enabled defendants to obtain patronage at their respective theatres which in the absence of such classification or clearance would have been obtained by plaintiff; that a fair measure of this damage to plaintiff's business is the difference between its box-office receipts during the period from May 2, 1946 to August 15, 1946, and the box-office receipts of Fox-Wisconsin Amusement Company in its Wisconsin Theatre during the same period, which difference, after proper adjustments for film rental and advertising, amounts to the sum of $118,101.32." (Italics ours.)

The ruling of the Court of Appeals also reversed Conclusion 9 of the trial court (R. 3347) holding:

> "9. In the instant case, the fixing of first run clear-

> ance by conspiracy between defendants is not an activity normally adopted to secure pecuniary reward for the monopoly granted by the copyright laws. Here the licenses are but part of a general plan to suppress competition, for which a copyright can no more be used than can a patent; namely, a plan to deter competition between rivals in the exploitation of their licenses and, as shown by the findings, the clearances here acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. Further, when used, as here, as implements in a price-fixing conspiracy which was illegal *per se*, the copyrights themselves can not be used to justify the restraints on competition occasioned by the clearance. *Since plaintiff, even when operating a second run theatre, was prevented from obtaining pictures at an earlier date by such illegal clearance,* the inevitable result of the clearance was to give to defendants' theatres patronage which otherwise would have gone to plaintiff's theatre, and plaintiff was therefore necessarily damaged by the imposition of this illegal clearance during the period from May 2, 1946 to August 15, 1946." (Italics ours.)

The trial court further held that the only condition precedent to an action of this kind was the ownership of an "available theatre" (R. 3345). That this ruling is correct is shown by the opinion in the case of *William Goldman Theatres, Inc.* v. *Loew's, Inc., et al.*, 150 F. 2d 738, 744, where the Court said:

> "* * * a course of conduct, by those who own all of the other available theatres in that area, and those who distribute the product, which eliminates from competition *the owner of the available theatre*, constitutes a violation of the statute." (Italics ours.)

The record shows that petitioner had an "available theatre" because its theatre was a first run theatre prior

to the time that respondent Fox acquired it by lease (R. 373) and the respondent Fox, pursuant to the conspiracy and pursuant to agreements with its lessors of its Palace and Wisconsin Theatres (R. 258, 265, 352, 355) placed the theatre in a subservient position under the Milwaukee Plan (R. 247). The Miller Theatre (later renamed the Towne Theatre) posed a threat to respondents' first run monopoly (R. 223) and for this reason was held back in its playing position by the Milwaukee Plan (R. 268, 269). The theatre had an excellent location within 100 feet of Third and Wisconsin Avenues, the businest corner in Milwaukee (R. 1588, 1702, 388, 358, 1699, 1700). In the opinion of a respondent's witness Raftery, it had a better location than any other theatre in Milwaukee (R. 830). All respondents considered it a fit theatre in which to exhibit their best pictures second run (Pl. Ex. 86, R. 2373). It was obviously fit for first run exhibition if it could have obtained the pictures because it had the same location it now has and more seats (R. 522, 530). *The respondents requested a finding that prior to December 26, 1946, petitioner's theatre was unsuitable for the exhibition of first run pictures* (R. 3361). *It was refused by the trial court* (R. 3624).

The fact that $200,000.00 was spent in making it the best theatre in Milwaukee, did not militate against an earlier playing position before such remodeling. This is shown by the fact that the Strand Theatre, operated by the respondent Fox, played first run pictures on a moveover run (R. 337) prior to the time it remodeled its theatre (R. 1769, 1782) and there is no reason suggested why petitioner's theatre, could not have done likewise if it had obtained the pictures. It is true that petitioner's theatre was not available for the playing of first run pictures when it was closed for remodeling, but no claim was made for damages during that period.

The fact that a demand was futile is adjudicated by the Court of Appeals, as follows (R. 3755):

> "Briefly, the record discloses that defendants or their predecessors in 1930 formulated a plan which was revised in 1933, known as the Milwaukee Plan. That this plan amounted to a conspiracy in violation of the anti-trust laws is not seriously disputed. It is plain that under this plan certain theatres, some of which were owned and operated by the defendants, were awarded a first run position for the exhibition of films with certain designated periods of clearances, and that others were awarded a second run position, also with certain designated periods of clearances over subsequent runs. *It is shown that the theatre subsequently acquired by plaintiff was designated as a second run theatre, and we think it is reasonable to conclude, as the court found, that it continued to occupy such a position after it was acquired by the plaintiff.*" (Italics ours.)

The entire contention made in respondents' answer (pages 3-11) that petitioner's theatre was unsuitable is beside the point. The competitive forces that in an open market would have determined its "suitability" were precluded by respondents' conspiracy. Since respondents were unwilling to let petitioner compete for first run pictures it certainly does not lie in their mouths to now say such competition would have been unavailing because petitioner's theatre was "unsuitable." Further, the suitability of petitioner's theatre is irrelevant to the question raised here as to whether the Court of Appeals has adversely affected the administration of the anti-trust laws by a ruling without equivocation that "a person aggrieved by the deprivation of a right either statutory or constitutional" cannot "recover for such deprivation *in the absence of a demand or request for its exercise.*" This ruling is made in the face of the finding by the Court of Appeals itself that the re-

spondents' conspiracy assigned petitioner's theatre to a second run playing position (R. 3755) and the further finding that even after spending $200,000.00 remodeling the theatre and making written demands for first run pictures, petitioner still could not get the pictures because of respondents' conspiracy (R. 3756-3758).

There is, therefore, no escape from the conclusion that the Court of Appeals has interpolated into the anti-trust laws the requirement that a futile demand is a condition precedent to any action for damages occasioned by a conspiracy and monopoly held to be illegal under those laws. This, we submit, raises a question of great importance in the administration of these laws.

The decision of the issue set forth in the opinion of the Court of Appeals is obviously wrong and designed to work untold harm in future civil anti-trust litigation. The true rule is stated with clarity in the case of *Ulrich, et al.* v. *Ethyl Gasoline Corporation*, 2 Federal Rules Decisions, 357, 359:

> "The plaintiffs claim damages from October 19, 1936, up to the date of filing of the petition on August 5, 1940. The defendant contends that proof of damage should be limited to the period between June 30, 1938, when the plaintiff's request for a license was refused and December 22, 1938, when they began to get a regular supply of Ethyl gasoline from the Kentucky Consumers Coil Company. I believe that the defendant's view on this question is much too narrow. If the defendant is guilty of an unlawful monopoly the plaintiff could be damaged by reason thereof before he actually applied for a license. *The refusal of his application was a confirmation of facts which may have existed for a considerable period of time prior thereto.*" (Italics ours.)

At pages 7 and 8 of the answer the further contention is made that petitioner did not want first run pictures during the first damage period. There is nothing in the record to sustain such a position except the request which was made for second run pictures, which the trial court found was made only after first run pictures had been refused and in order to keep petitioner's theatre open (R. 3338). Further, the record conclusively established by the testimony of Edward C. Raftery, a respondent's witness, that Spheeris and Papas were seeking to license first run pictures for the Miller Theatre as early as April, 1946 (R. 807). Raftery was questioned on this subject on cross-examination as follows:

> Q. Were they talking to you about second and third run United Artists pictures?
>
> **A. Of course not (R. 826).**

When he was further questioned on first run pictures Raftery's answer was unequivocal that the main thing that petitioner was interested in was first run pictures in April of 1946 (R. 822). It was, therefore, conclusively established that petitioner was seeking first run pictures from United Artists, and respondents' counsel conceded in the Court below that if petitioner's theatre "was going to be a first run theatre, it wanted first run pictures from everybody, not just from somebody, not just for some days of the week" (R. 1965). While it is obviously impossible to reargue the facts contained in a three thousand page record in a petition for certiorari, there is no question but that on this record there is substantial evidence in support of the trial court's findings (R. 3341) that petitioner was prevented from obtaining first run pictures by the defendants' conspiracy. This constitutes the so-called "fact of damage" as a matter of law and the decision of this Court in *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.*, 327 U. S. 251, so holds.

II.

IT WAS NOT WITHIN THE AUTHORITY OF THE COURT BELOW TO SET ASIDE THE FINDINGS OF THE TRIAL COURT THAT PETITIONER HAD DEMANDED FIRST RUN PICTURES IN 1946, AND THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THAT OF THIS COURT IN THE CASE OF UNITED STATES vs. YELLOW CAB COMPANY.

Under Rule 52(a), findings of fact entered by a trial court cannot be set aside by a reviewing court unless "clearly erroneous".

The trial court held (Findings 34 and 35, R. 3338):

> "34. Sometime between April 3, 1946 and April 18, 1946, plaintiff sought to license first run pictures from all defendant distributors and orally demanded that it be permitted so to do from the Branch Managers of said companies; that plaintiff thereupon was advised that the Miller Theatre was not entitled to license first run pictures because it was a second-run theatre and the pictures were being sold first run to the Fox theatres and the Warner theatres.
>
> "35. While negotiations for first run pictures continued with United Artists, plaintiff, in order to keep its theatre open, requested and obtained pictures second run."

These findings were entered because the senior judge of the District Court believed the testimony of Spheeris (R. 369, 370, 371, 372-375, 380-381, 466) that such demands were made.

The trial court characterized the opposing testimony of respondents' witnesses (R. 3566) as follows:

> The Court: "Now, I observed these men who testified here. They are bright, shrewd men. But their loyalty to somebody away, away off yonder far transcends their fear of this or any other court, or, I am sure, their fear of the hereafter. That is the situation."

In the case of *United States* v. *Yellow Cab Company,* 338 U. S. 338, 342, this Court said:

> "* * * Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.' "

This Court further said at page 341 of that opinion:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified."

In the instant case, the reason for the rule becomes abundantly clear by the unconscionable result achieved by the decision of the Court of Appeals. Here Andrew M. Spheeris, a graduate of the University of Wisconsin and of its Law School (R. 362) and a Lieutenant Colonel in the United States Army (R. 363), who served his country in World War II with General Patton's Army in the European theatre of operations (R. 537), is condemned a perjurer by a court who never saw him, on controverting testimony that the trial judge held came from the mouths of perjurers (R. 3566).

It is interesting to compare the decision of the Court of Appeals for the Third Circuit in the recent case of *Milgram, et al.* v. *Loew's, Inc., et al.,* C. C. H. Tr. Reg. Rep. Par. 62,938 (C. A. 3, 1951) where the court said:

> "But we cannot stress too strongly that the credibility of those witnesses was a matter peculiarly within the province of the trial judge. Rule 52, Federal Rules of Civil Procedure. * * * It may be noted that there was a conflict between the testimony of Milgram and that of the many district managers and salesmen with respect to Milgram's alleged requests for first run features. Milgram had testified concerning conversations which the distributors' witnesses in many cases denied.

> As the trial judge concluded that Milgram's testimony was more accurate, it is implicit that the credibility of defendants' witnesses was damaged in his eyes."

We submit that if the present decision stands, little if anything remains of Rule 52(a) of the Federal Rules of Civil Procedure, and this Court's ruling in the *Yellow Cab Company* case that a trial court's determination of which witness to believe cannot be held "clearly erroneous" is in effect reversed.

CONCLUSION.

As we have pointed out, the questions involved in this petition are of importance to the public and to the administration of the anti-trust laws and transcend the rights of these litigants. The real question presented is whether or not the Court of Appeals for the Seventh Circuit is to be permitted to destroy the efficacy of the anti-trust laws in that Circuit by legal interpolations which have no justification in the law or in the statutes. The harm to the public interest is created by the establishment in the instant case of a precedent which if permitted to stand will destroy the rights of many victims of anti-trust violations in subsequent litigation under those laws.

For the reasons given here and in the petition, we submit that a writ of certiorari should issue, limited to the issues raised in the petition.

Respectfully submitted,

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